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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

v.

DONALD C. FLOWERS AND KING E. JONES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the six-month limitations period contained in § 10(b) of the National Labor Relations Act determines the timeliness of a suit alleging that a union has breached the duty of fair representation created by that Act?

2. If not, whether in a hybrid § 301/breach-of-duty of fair representation action brought against an employer and union, the state statute of limitations governing actions to vacate arbitration awards, which *United Parcel Service v. Mitchell*, 451 U.S. 56, "borrowed" to determine the timeliness of the claim against the employer, also determines the timeliness of the claim against the union?

LIST OF PARTIES

In addition to the parties listed in the caption, the Bethlehem Steel Corporation was a defendant in the district court and an appellee in the court of appeals.

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OCTOBER TERM, 1981

No.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United Steelworkers of America, AFL-CIO-CLC ("USWA"), and its Local Union 2602, hereby petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, enabling this Court to review the judgment in *Donald C. Flowers and King E. Jones v. Local 2602 of the United Steelworkers of America, and United Steelworkers of America, International, and Bethlehem Steel Corporation,* (C.A. 2, No. 80-7020) (decided February 1, 1982).

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the federation of national and international unions with which USWA is

affiliated, supports the request for a writ of certiorari. This petition, which is the joint product of USWA and the AFL-CIO, reflects the identity of their views on the issues presented, and their desire to minimize the burdens on the Court by stating their common position only once.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of New York is not officially reported and is reprinted as Appendix E to this petition. The judgment of the District Court is reprinted as App. F. The Court of Appeals for the Second Circuit's *per curiam* judgment on the first appeal is unreported and is reprinted as App. D. The order of this Court granting the first petition for certiorari, vacating the judgment of the courts of appeals, and remanding the case for reconsideration in light of this Court's decision in *United Parcel Service v. Mitchell*, 451 U.S. 56, is reported at 451 U.S. 965, and is reprinted as App. C. The opinion of the court of appeals on remand is reported at 671 F.2d 87 and is reprinted as App. A.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was issued on February 1, 1982 (App. B). On April 21, 1982, Justice Marshall signed an order extending the time for filing a petition for a writ of certiorari to and including June 2, 1982 (App. G), and on May 20, 1982, Justice Marshall signed an order further extending the time for filing a petition to and including July 1, 1982 (App. H). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are reprinted in App. I.

STATEMENT OF THE CASE [1]

Plaintiffs (respondents in this Court) are two employees of defendant Bethlehem Steel Corporation (hereinafter "the Company"), employed at its Lackawanna, New York plant, and represented for collective bargaining purposes by defendants United Steelworkers of America, AFL-CIO, and its Local Union 2602 (the petitioners in this Court, hereinafter collectively referred to as the "Union"). The Union and Company are parties to a collective bargaining agreement which contains, *inter alia*, a grievance and arbitration procedure for resolving differences "as to the meaning and application of the provisions of this Agreement." The Agreement empowers the Union to submit to arbitration grievances that cannot be resolved between the parties in the four-step grievance procedure established by the Agreement. The Agreement further provides that the arbitrator's resolution of a grievance "shall be final and binding upon the Company, the Union, and all Employees concerned therein."

Plaintiffs, who are craft welders, filed several grievances in 1975 and 1976 claiming that the Company had assigned their normal craft welding duties to others, while plaintiffs were on layoff or were assigned to non-craft work. Plaintiffs contended in their grievances that in doing so the Company had violated the collective bargaining agreement. The grievances sought backpay for the work opportunities plaintiffs had lost.

Throughout all steps of the grievance procedure the Company insisted that the plaintiffs' claims were without merit, and the Union invoked arbitration. On February 24, 1978, following an evidentiary hearing, the arbitrator

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[1] The case is here from the district court's granting of a motion to dismiss, and the court of appeals' reversal of that dismissal. Accordingly, the "facts" recited herein are those alleged in the complaint, which for present purposes must be assumed to be true.

issued an award holding that the Company's conduct had not violated the Agreement.

The complaint in this action was filed by plaintiffs on January 9, 1979, eleven months after the arbitrator issued the award. The complaint contained two counts, the first addressed to the Company and the second to the Union. Count I alleged that the Company violated the collective bargaining agreement by assigning welding work to others while plaintiffs were laid off or assigned to other work. Count II alleged that the Union's "preparation, investigation and handling of [plaintiff's grievances in arbitration] was so inept and careless as to be arbitrary and capricious" and thus constituted a violation of the Union's duty of fair representation.

The Union and Company each moved to dismiss the complaint on the ground that the suit was time-barred. The district court granted the motions to dismiss, holding that New York's 90-day statute of limitations for vacating arbitration awards is "the statute most specifically and obviously applicable to fair representation suits seeking to overturn the decision of an arbitrator" and that "applying [that statute] to federal labor law also serves the same policies that the statute serves in state law matters" (App. 14a). Plaintiffs appealed to the United States Court of Appeals for the Second Circuit.

While the appeal was pending, the Second Circuit decided *Mitchell v. United Parcel Service*, 624 F.2d 394 (1980), *rev'd*, 451 U.S. 56, an unrelated case posing the identical limitations question. In that case the Second Circuit reasoned that breach of contract and breach of duty suits "cannot be equated to direct attacks on arbitration awards," *id.* at 397, and accordingly held that "New York's six year limitations period for contractual breaches . . . is applicable to . . . actions by employees alleging wrongful discharge by the employer and breach of the fair representation duty by the union—regardless

of whether the discharge was upheld by an arbitral panel or became final short of arbitration," *id.* at 398.

On March 24, 1980, the Second Circuit issued a *per curiam* order in the instant case overturning the district court's decision (App. 10a). The order provided:

> [T]he order of said District Court be and it hereby is reversed based on this court's decision in *Mitchell v. United Parcel Service, Inc.*, slip op. 1525 (2d Cir. March 3, 1980), and the case is remanded to the district court.

The employer in *Mitchell* filed a petition for a writ of certiorari seeking review of the Second Circuit's decision in that case, and the Union in the instant case thereafter filed a petition for certiorari seeking review of the Second Circuit's decision herein. The *Mitchell* petition was granted, 449 U.S. 898, and this Court reversed the Second Circuit's judgment, holding that because Mitchell's claim against his employer was dependent upon proof that his "Union's duty to represent him fairly at the arbitration had been breached," the most analogous state statute of limitations was New York's 90-day statute for actions to vacate arbitration awards, under which Mitchell's claim was untimely. 451 U.S. at 62. The Court reserved the question whether, if properly raised, the six-month statute of limitations contained in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), would determine the timeliness of plaintiffs' claim, explaining that that question had been raised only by the AFL-CIO as *amicus curiae* and not by the parties, and that "the same result would obtain" were § 10(b) applicable. *Id.* at 60, n.2.

Two weeks after deciding *Mitchell*, the Court granted the Union's petition in the instant case, vacated the Second Circuit's decision, and remanded the case for reconsideration in light of *Mitchell* (App. 9a).

On remand of the instant case, a two-judge panel of the court of appeals, after receiving supplemental briefs,

affirmed the district court's judgment of dismissal in part and reversed that judgment in part. With respect to the claim against the Company, the court of appeals held that *Mitchell* required dismissal (App. 2a). But because the union in *Mitchell* had not sought review in this Court, the court of appeals did not view *Mitchell* as controlling with respect to the claim against the Union here, and the appellate court proceeded to inquire "whether the broad language of *Mitchell* applies to the duty of fair representation claim as well as to the breach of contract claim" (*Id.*)

In pursuing this inquiry, the court of appeals recognized that the "majority in *Mitchell* did not specifically limit the applicability of its decision to an employee's claim against his employer" (*id.* at 3a), and, indeed, that "[t]he [Supreme] Court's reasoning [in *Mitchell*] arguably may require applying the same time limit to causes of action against the union since the Court found . . . that 'to prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to contract but must also carry the burden of demonstrating breach of duty by the Union'" (*id.*, quoting 451 U.S. at 62). But while admittedly "pressed" by what it termed "the dicta of the majority [in *Mitchell*]" (App. 5a), the court of appeals found "more persuasive [the] reasoning expressed in a solitary dissenting opinion" of Justice Stevens (*id.*), and stated: "We believe Justice Stevens to be correct that the claim against the union for unfair representation may not be 'characterized as an action to vacate an arbitration award'" (App. 3a).

The court of appeals then turned to the separate question whether, as the Union had urged, the six-month limitations period of § 10(b) applied to plaintiff's fair representation claim. The court held that it did not, stating:

> We are persuaded by Justice Stevens' view [in *Mitchell*] that section 10(b) is inapplicable both because it relates only to administrative procedures established by Congress to resolve unfair labor practices (*see* Justice Stewart's concurrence) and because it was adopted by Congress six years before the duty of fair representation was recognized. Indeed, not until *Vaca v. Sipes*, 386 U.S. 171 (1967), did the Court clearly hold the duty judicially enforceable. [App. 5a-6a; footnotes omitted]

Having rejected the applicability of § 10(b) and the state arbitration statute, the court of appeals held that New York's "three-year nonmedical malpractice statute of limitations applies to the employees' action against the union for breach of its duty of fair representation," (App. 6a), and accordingly ruled that plaintiffs' claim against the union was timely. On the basis of the foregoing, the court of appeals affirmed the judgment of dismissal with respect to the Company and reversed the judgment of dismissal with respect to the Union, remanding the claim against the Union for a determination on the merits.

REASONS FOR GRANTING THE WRIT

The decision below raises two questions of fundamental importance in the litigation of "hybrid § 301 breach-of-duty actions," *Mitchell*, *supra*, 451 U.S. at 60 n.2 [2]

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[2] Such suits are "hybrid" because they present interdependent claims of (1) a breach of contract, which breach is actionable under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, and (2) a breach of the duty of fair representation, which breach is actionable under a "judicially implied cause of action," *Electrical Workers v. Foust*, 447 U.S. 42, 47 n. 9, to enforce the duty which is itself "implied in the National Labor Relations Act," *id.* at 46 n. 8. In such a hybrid § 301/breach-of-duty action, "[t]o prevail against either the company or the Union, [the plaintiff] must not only show that [the Company's action] was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *Hines v. Anchor Motor Freight*, 424 U.S. 554, 570-71.

—actions that contribute significantly to the caseload of federal and state courts throughout the nation.

The threshold question is whether the six-month limitations period contained in § 10(b) of the National Labor Relations Act applies to duty of fair representation claims, or whether, instead, a state limitations period must be borrowed. The *Mitchell* court expressly left that question open because the parties in that case had not invoked or addressed § 10(b) (p. 5, *supra*). The § 10(b) question is squarely raised here. And the Second Circuit's ruling on that question conflicts with a post-*Mitchell* decision by the Sixth Circuit holding § 10(b) to be applicable to a hybrid § 301/breach-of-duty action (p. 12, *infra*).

If the Court were to conclude that § 10(b) is not applicable here, the other question decided below would then assume critical importance in the litigation of hybrid § 301/breach-of-duty claims: are state statutes of limitations governing actions to vacate arbitration awards, which *Mitchell* held applicable to such claims against employers, also the "appropriate" statutes to be borrowed for such claims against unions. On this issue, the decision below—rejecting the arbitration time limit and applying the limitations period for attorney malpractice actions—conflicts with decisions of the Fourth, Sixth, and Ninth Circuits, and, moreover, is inconsistent with the rationale of *Mitchell* itself, as the court below virtually conceded. *See* pp. 13-17, *infra*.

The two questions presented herein merit immediate consideration by this Court. Because this Court did not reach the § 10(b) issue in *Mitchell*, and because the union in that case did not seek review of the Second Circuit's decision to borrow a contract limitations period, this Court's decision leaves uncertain what limitations period applies to hybrid § 301/breach-of-duty actions against unions. There are an enormous number of such actions pending in the lower courts, in many of which limitations defenses

have been raised that—depending on the answers to these questions—may be dispositive. As noted, the courts of appeals are divided on these issues. And the law in this area in the district courts—in which 52 decisions involving the questions presented here have been issued in the 14 months since *Mitchell* was decided—is in disarray.[3]

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[3] The post-*Mitchell* district court decisions divide six ways:

1. Seven courts have held § 10(b) to be applicable to fair representation claims and on that basis have dismissed such claims against unions (or, in two instances, refused to dismiss claims that would have been dismissable were the state arbitration statute of limitations applicable). *See, Benson v. General Motors Corp.*, 81 M 0416 (N.D. Ala. 1981), *app. pending*, 82-7015 (11th Cir.); *Bates v. American Tara Corp.*, C 81 768 A (N.D. Ga. 1981), *app. pending*, 82-8137 (11th Cir.); *Brown v. S. Central Bell*, 81 P 1678 S (N.D. Ala. 1982); *Collins v. Car Carriers, Inc.*, 536 F.Supp. 776 (N.D. Ill. 1982); *Hanson v. Motor Convoy, Inc.*, 80 1482 CIV EBD (S.D. Fla. 1981); *Kaftantzis v. D&L Transport Co.*, 531 F.Supp. 566 (N.D. Ill. 1982); *Ruffin v. Communication Workers*, 78 2894 (E.D. La. 1981), *app. pending*, 82-3127 (5th Cir.); *Vantine v. Sun Ship Building & Dry Dock Co.*, 82-701 (E.D. Pa. 1982) (dictum).

2. Two courts have held § 10(b) not applicable but have borrowed the state arbitration statute of limitations period instead to determine the timeliness of the fair representation claim against a union. *Fedor v. Hygrade Food Products Corp.*, 535 F.Supp. 269 (E.D. Pa. 1982); *Sheeran v. MA Bruder & Sons, Inc.*, 524 F.Supp. 567 (E.D. Pa. 1981).

3. Thirty-two courts, without considering § 10(b), have simply applied the state arbitration statute of limitations to a fair representation claim against a union. *Assad v. Mt. Sinai Hospital*, 81-C-2273 (E.D.N.Y. 1982); *Bigbie v. Teamsters Local 142*, 520 F.Supp. 402 (N.D. Ill. (1981); *Cade v. Bethlehem Steel Corp., et al.*, JH 80-3332 (D.Md. 1982); *Collins v. Cook Paint & Varnish Co.*, C-81-2795 EFL; *Creed v. Miller Transporters Inc. & Teamsters*, GC 81-32-WK-P (N.D. Miss. 1981); *D'Andrea v. Postal Workers*, C-1-78-520 (S.D. Ohio 1981); *Davenport v. Champion Int'l Corp.*, 80 G 1262-NW (N.D. Ala. 1982); *Dreher v. Crown Zellerbach*, 80-185 LE (D.Ore. 1982); *Edwards v. Sea-Land*, 8 81 738 (S.D. Tex.), *app. pending*, 81-2283 (5th Cir.); *Englesberg v. Transcon Lines Inc.*, 520 F.Supp. 628 (W.D. Wash. 1982); *Essary v. Railroad Yardmasters*, 77 C 4651 (N.D. Ill. 1981); *Evans v. Maislin Trans-*

I. THE § 10(b) ISSUE

The question whether § 10(b) or a state limitations period applies to fair representation claims is an open

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port Ltd., No. 81 C 2753 (N.D.Ill. 1982); *Fields v. Babcock & Wilcox*, 108 L.R.R.M. 3150 (W.D.Pa. 1981); *Fogel v. Teamsters Local 773*, 531 F.Supp. 483 (E.D.Pa. 1982); *Ford v. BP Oil Co.*, JH 81-90 (D.Md. 1981); *Gerba v. Gilmore Steel Corp.*, 81-985 (D.Ore. 1982); *Hand v. Chemical Workers*, MCA 81 0219 (N.D.Fla. 1981), *app. pending*, 81-5828 (11th Cir.); *Hudson v. Teamsters*, 536 F.Supp. 1138 (S.D. Ohio 1982); *Jenkins v. Steelworkers*, 80-721 (E.D. Pa. 1982); *Kikos v. Teamsters*, 526 F.Supp. 110 (E.D. Mich. 1981); *Krakowski v. Machinists*, 4-81-706 (D. Minn.); *Leach v. Postal Service, et al.*, C-1-80-526 (S.D. Ohio 1981); *Madia v. Pacific Inter. Express*, No. 81 C 360 (N.D. Ill. 1982); *McCoy v. Teamsters Local 100*, 526 F.Supp. 1256 (S.D. Ohio 1981); *Murray v. Branch Motor Express Co.*, HM78-1714 (D.Md. 1982); *Penson v. Chrysler Corp.*, 109 L.R.R.M. 3359 (N.D. Ohio 1981); *Pyle v. Arco Polymers, Inc.*, 81 C 3586 (N.D. Ill. 1982); *Reynolds v. Pacific Motor Trucking*, C-80-3055 (N.D. Cal. 1982); *Rigby v. Roadway Express*, 109 L.R.R.M. 3252 (S.D. Miss. 1981), *app. pending*, 81-4516 (5th Cir.); *Ross v. Bethlehem Steel Corp., et al.*, 109 L.R.R.M. 2791 (D. Md. 1981); *Talley v. USPS*, 532 F.Supp. 786 (D. Minn. 1982).

4. Four courts have held § 10(b) not applicable, and have borrowed a state tort limitations period to determine the timeliness of the fair representation claim against a union. *Dent v. USPS*, C-1-81-537 (S.D. Ohio 1981); *Mabane v. Metal Masters Food Service Equip. Co.*, K 80-973 (D. Md. 1982); *Rogers v. Lockheed Georgia Co.*, C 80 461A (N.D. Ga. 1981), *app. pending*, 81-7810 (11th Cir.); *Suwanchi v. Electrical Workers*, 528 F.Supp. 851 (D.N.H. 1981).

5. Two courts, without considering § 10(b), have borrowed a state tort limitations period. *Graham v. Chemical Workers*, 81 535 (M.D. Fla. 1981), *app. pending*, 82-5115 (11th Cir.); *McFarland v. Teamsters*, 535 F.Supp. 970 (N.D. Tex. 1982).

6. Five courts have decided that either § 10(b) or a state arbitration statute applies, but have declined to decide which is applicable, finding claims untimely under either alternative. *Creer v. USPS*, 109 LRRM 2706 (N.D. Ala. 1981); *McQuay v. Bethlehem Steel Corp.*, 109 LRRM 2159 (D. Md. 1981); *Reno v. Teamsters Local 568*, No. 82-0278 (W.D. La.), *Scott v. Chrysler Corp.*, 107 LRRM 3086 (E. D.Mich. 1981); *Stevens v. Gateway Transportation Co.*, 79 L 2228 (N.D. Ill. 1982).

The forty-six decisions cited in paragraphs 1, 2, 3 and 6 of this footnote are in conflict with the Second Circuit's decision in the

one in this Court. In *Mitchell* the Court stated at the outset of its opinion:

> *Amicus* The American Federation of Labor and Congress of Industrial Organizations has filed a brief arguing that in cases such as the present courts should apply the 6-month limitations period found in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). The AFL-CIO distinguishes . . . [*UAW v.*] *Hoosier Cardinal* [*Corp.*, 383 U.S. 696 (1966), in which the Court had applied a state limitations period to a § 301 claim] on the ground that *Hoosier Cardinal* involved a § 301 action by a union against an employer, while actions brought by employees against both their union and employer . . . are hybrid § 301 breach of duty actions, the union's duty being implied from the NLRA. *We decline to consider this argument since it was not raised by either of the parties here or below.* Our grant of certiorari was to consider *which* state limitations period should be borrowed, not whether such borrowing was appropriate. The parties have considered the question as being limited to which state limitations period to borrow. Since respondent filed his complaint beyond the 6-month period, the same result would obtain in this case were we to adopt the AFL-CIO's position. [451 U.S. at 60 n.2 (emphasis added; citations omitted)]

That the § 10(b) question merits the attention of this Court is apparent from the conflicting views that were expressed in the concurring and dissenting opinions in *Mitchell*, as well as from the circuit conflict that has subsequently developed. Justice Stewart alone in *Mitchell* would have decided the § 10(b) issue despite the parties'

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instant case; the six decisions cited in paragraphs 4 and 5 are consistent with the Second Circuit's decision.

A number of these cases are still pending either in the district court on claims which were not dismissed, or in the courts of appeals. In addition, we are aware of another sixty pending hybrid § 301/breach-of-duty actions in which dispositive limitations issues have been raised but have not yet been decided; a listing of those cases appears in Appendix J, App. 23a-24a.

failure to address it, and he concluded that "§ 10(b) is . . . the proper source for determining when claims of breach of duty must be raised," *id.* at 68 n.3. Justice Stewart reasoned that § 10(b) "is a clear indication of Congress' judgment of when claims of a very similar or identical character must be brought," *id.* at 68 n.3, and that "the policy behind [§ 10(b)]"—"to safeguard the stability of collective-bargaining agreements"—"applies with equal force in this [fair representation] context," *id.* at 68.

Two other Justices in *Mitchell*, while concluding that "resolution of the § 10(b) question properly should await the development of a full adversarial record," *id.* at 65 (Blackmun, J., concurring), see also *id.* at 76 (Stevens, J., dissenting), nonetheless commented on the question. In his concurring opinion, Justice Blackmun stated: "I find much that is persuasive in Justice Stewart's analysis." *Id.* at 65. And in his dissenting opinion Justice Stevens voiced an opposite opinion, stating that "[t]he plain language of [§10(b)] indicates that it is directed solely to the administrative procedure established by Congress . . . for the resolution of unfair labor practice charges," *id.* at 76 n.8, and that it would be "strain[ing] to conclude that Congress intended that § 10(b) . . . be applied to causes of action that this Court had not yet divined when § 10(b) was enacted," *id.* at 76.

In the wake of *Mitchell*, the courts of appeals have rendered conflicting decisions on the § 10(b) issue left open in *Mitchell*. The court below, of course, held that § 10(b) does not apply to fair representation claims. But in *Badon v. General Motors Corp.*, 110 LRRM 2562 (6th Cir. May 25, 1982), the United States Court of Appeals for the Sixth Circuit applied § 10(b) to a hybrid § 301/breach-of-duty action against a union, finding § 10(b) to be "the most appropriate statute of limitations under the[] circumstances [of that case]," *id.* at 2566.[4]

[4] The "circumstances" to which the *Badon* court referred were the unavailability of any state arbitration time limit that could be

The question whether § 10(b) or state law determines the limitations period for fair representation lawsuits thus is unsettled in this Court and has divided the courts of appeals. The proper resolution of the question is critical to the course of litigation of a large number of fair representation claims and may be dispositive of numerous pending cases (p. 11, n.3, *supra*). For these reasons the Court should grant a writ of certiorari to resolve the issue.

II. THE APPROPRIATE STATE LIMITATIONS PERIOD ISSUE

If the Court were to conclude that § 10(b) is not applicable to fair representation lawsuits, then the Court would confront the other question decided by the court below: are state arbitration statutes of limitations, which *Mitchell* teaches are the "appropriate" statutes to be borrowed for hybrid § 301/breach-of-duty claims against employers, also the appropriate state statutes to be borrowed for such claims against unions. The lower court's negative answer to that question is inconsistent with the rationale of this Court's decision in *Mitchell* and in conflict with the post-*Mitchell* decisions of three other courts of appeals.

"borrowed"; the court ruled that if such a time limit were available it would control, but that as Michigan's judicially-promulgated time limit for bringing actions to vacate arbitration awards is by its terms inapplicable to labor arbitration "borrowing" it would be inappropriate. In the absence of a "borrowable" state arbitration time limit, the *Badon* court concluded, in direct conflict with the Second Circuit's decision herein, that § 10(b)—and not state tort or contract limitation statutes—was the appropriate source for determining the timeliness of hybrid § 301/breach-of-duty claims against union.

In our view, the question whether § 10(b) applies to fair representation claims should have been the threshold issue in *Badon* (and not the second question to be decided) for if federal law (through § 10(b)) supplies a limitations period for fair representation claims, there then is no occasion to "borrow" state limitations periods. The *Badon* court's error in the order in which it addressed the issues, however, does not affect its analysis of the § 10(b) issue once it found that Michigan had no applicable arbitration time limit.

1. The court of appeals' conclusion turns the Court's analysis in *Mitchell* on its head, as the appellate court itself virtually conceded (p. 6, *supra*). In *Mitchell*, this Court noted that the elements of a hybrid § 301/breach-of-duty claim against an employer are the same as the elements of such a claim against a union, stating:

> 'To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union.' [451 U.S. at 62, quoting *Hines*, *supra*, 424 U.S. at 570-571]

Moreover, in *Mitchell* the Court rejected the plaintiff's contention that the statute of limitations applicable to suits for breach of contract should govern his action against the employer precisely because plaintiff, in order to prevail against the employer, was required to prove not just a breach of contract but also a breach by the union of its duty of fair representation. It was the *fair representation* component that the Court held warranted application of the shorter time limit, and the employer secured the benefit of that shorter time limit because proof of a breach of the union's duty was an element of the contract claim against the employer:

> It is true that respondent's underlying claim against his employer is based on the collective-bargaining agreement, a contract. It is not enough, however, for an employee such as respondent to prove that he was discharged in violation of the collective-bargaining agreement . . . . [*R*]*espondent's characterization of his action against the employer as one for "breach of contract" ignores* the significance of the fact that it was brought in the District Court pursuant to § 301(a) of the LMRA and *that the indispensable predicate for such an action is not a showing under traditional contract law that the discharge was a breach of the collective-bargaining agreement, but instead a demonstration that the union breached its duty of fair representation.* Since

> the conclusion of the Joint Panel was, under the collective-bargaining agreement, "binding on all parties," *respondent was required in some way to show that the Union's duty to represent him fairly at the arbitration had been breached before he was entitled to reach the merits of his contract claim.* This, in our view, makes the suit more analogous to an action to vacate an arbitration award than to a straight contract action.
>
> *We think that the unfair representation claim made by an employee against his union, even though his employer may ultimately be called upon to respond in damages for it if he is successful, is more a creature of "labor law" as it has developed since the enactment of § 301 than it is of general contract law.* [451 U.S. at 62-63; emphasis added]

Thus, to hold that the claim against the union is not governed by the arbitration statute that this Court applied to the claim against the employer flies in the teeth of *Mitchell.*

2. In the wake of *Mitchell*, three courts of appeals have concluded, contrary to the decision below, that state arbitration time limits apply to hybrid § 301/breach-of-duty claims against unions that arise in the grievance-arbitration context just as this Court held that those time limits apply to such claims against employers.

In *Singer v. The Flying Tiger Line, Inc.*, 652 F.2d 1349 (9th Cir. 1981), the United States Court of Appeals for the Ninth Circuit interpreted *Mitchell* to mean "that a suit against a union and employer following an arbitration award could best be characterized as a suit to vacate the arbitration award." *Id.* at 1353. The court accordingly held that "we shall treat suits against the union for a breach of the duty of fair representation and against an employer for a breach of a collective bargaining agreement under this type of limitations statute." *Id.*[5]

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[5] The court in *Singer* went on to hold that within the Ninth Circuit *Mitchell* would be given only prospective effect because

In *Badon v. General Motors*, *supra*, the United States Court of Appeals for the Sixth Circuit reached the same conclusion, finding that "[t]he *Mitchell* rule . . . applies to [plaintiff's] unfair representation claim against the [union]" (110 LRRM at 2505). The court added:

> Although certain distinctions can be drawn between the separate section 301 claims against the company and the union, *see Mitchell*, *supra*, at 72-75 (Stevens, J., concurring in part, dissenting in part), we feel the better rule applies the same statute of limitations to both parties.[6]

Finally, in *DelCostello v. Teamsters*, No. 81-2086 (April 19, 1982), the United States Court of Appeals for the Fourth Circuit also held a state arbitration time limit applicable to a fair representation claim against a union. The district court in that case had, in the court of appeals' words, "dismissed the suit and ruled that it was barred as to both the employer and the union by the

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within that circuit "the *Mitchell* case is not one which might have been anticipated" and the plaintiff in *Singer* "might reasonably have relied upon [an earlier Ninth Circuit decision] to conclude that he had three years to file a claim." 652 F.2d at 1353. Plaintiffs here can make no similar claim, for in October, 1976, sixteen months *before* plaintiffs' cause of action accrued, the Western District of New York (where this case was filed) ruled that the limitations period for hybrid § 301/fair representation claims arising in the grievance-arbitration context was the 90-day limitations period for actions to vacate such awards. *Barbarino v. Anchor Motor Freight, Inc.*, 421 F.Supp. 1003 (W.D.N.Y. 1976). Indeed, respondents did not even seek below a ruling that *Mitchell* is not retroactive and the court below *did* apply *Mitchell* retroactively by dismissing the claim against the Company.

[6] In *Badon* the court went on to hold that Michigan's judicially-promulgated rule fixing the time within which challenges to arbitration awards must be brought would not be borrowed in a hybrid § 301/breach-of-duty action against either an employer or a union because that rule, by its terms, excludes actions involving labor arbitrations. See n.4, *supra*. But in other jurisdictions within the Sixth Circuit, in which state arbitration statutes do not contain such an exclusion, *Badon* requires the application of such statutes to hybrid § 301/breach-of-duty claims against unions.

thirty-day limitations period contained in [the Maryland statute governing actions to vacate arbitration awards]." The court of appeals held that "the district court was correct in its conclusion" and the appellate court "affirm[ed] on the basis of [the district court's] memorandum and order." [7]

The rule established by the decision below for cases within the Second Circuit thus is in square conflict with the rule in three other circuits, as well as inconsistent with the rationale of *Mitchell*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[7] The Fourth Circuit's opinion in *DelCostello* is unreported, and is reprinted as App. K to this petition. The district court's decision is reported at 524 F.Supp. 721.

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 957, Docket 80-7020

DONALD C. FLOWERS and KING E. JONES,
Appellants,

v.

LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA, and UNITED STEEL WORKERS OF AMERICA, INTERNATIONAL, and BETHLEHEM STEEL CORPORATION,
Appellees.

Argued March 21, 1980

Decided Feb. 1, 1982

Before LUMBARD and OAKES, Circuit Judges.*

OAKES, Circuit Judge:

On May 4, 1981 the Supreme Court vacated this court's judgment, made by summary order, in favor of appellants Flowers and Jones, and remanded this action for further consideration in light of *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981).

Flowers and Jones, craft welders at the Bethlehem Steel Corporation, commenced this action against both their employer and their union under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging that Bethlehem Steel breached its collective bargain-

* Judge Mulligan left the court before the judgment in this cause was vacated and the cause remanded to this court for reconsideration. In accordance with § 0.14(b) of the Rules of this Court this appeal was decided solely by the two remaining members of the panel who are in agreement and who do not request the designation of a third judge.

ing contract by wrongfully discharging the employees and that Local 2602 subsequently breached its duty of fair representation in an arbitration hearing. The complaint in this action was filed approximately eleven months after the employees, represented by the union, had lost in arbitration on the wrongful-discharge claim. The district court dismissed the complaint for failure to comply with New York's ninety-day statute of limitations for suits to vacate or modify an arbitration award. N.Y.Civ.Prac.Law § 7511(a) (McKinney). We reversed on the basis of the decision in *Mitchell v. United Parcel Service, Inc.*, 624 F.2d 394 (2d Cir. 1980), which held on similar facts that the lower court should have applied New York's six-year limitations period for actions alleging breach of contract. N.Y.Civ.Prac.Law § 213(2) (McKinney).

The employer in *Mitchell* petitioned for review of the court of appeals' decision, although the union did not do so. The Supreme Court characterized the claim against the employer for wrongful discharge as in essence an action to set aside an arbitration award. Accordingly, the Court reversed and stated that the appropriate standard to apply was the ninety-day limitations period for actions to vacate an arbitration award. But as Justice Stevens emphasized in his opinion, concurring in part and dissenting in part, the Court's reasoning as to the claim against the employer did not necessarily determine which statute of limitations governed the employee's claim against the union for lack of fair representation. Thus, on remand in *Flowers* we must reverse under *Mitchell* as to the employer Bethlehem Steel Corporation and we hereby do so. But we still must resolve whether the broad language of *Mitchell* applies to the duty of fair representation claim as well as to the breach of contract claim. If we conclude that it does not, we must also determine which statute of limitations applies. We have read with interest the parties' briefs on these questions.

We believe Justice Stevens to be correct that the claim against the union for unfair representation may not be "characterized as an action to vacate an arbitration award." 451 U.S. at 73, 101 S.Ct. at 1569. If the employee prevails against the union, the arbitration award is unaffected since the arbitration "Joint Panel" did not address any dispute between the employee and the union. Moreover, the claim that the union breached its duty of fair representation, as Justice Stevens pointed out in his footnote 3,[1] could not be resolved in the arbitration proceeding because it arose out of the conduct of that proceeding itself. Conceptually, then, we agree that the claim against the union is not governed by the statute of limitations for actions to vacate arbitration.

What makes the case difficult is that having Justice Stevens' opinion before it, the seven-person majority in *Mitchell* did not specifically limit the applicability of its decision to an employee's claim against his employer. The Court's reasoning arguably may require applying the same time limit to causes of action against the union since the Court found, quoting *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71, 96 S.Ct. 1048, 1059. 47 L.Ed.2d 231 (1976), that "to prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. . . . The grievance process cannot be expected to be error-free." *See* 451 U.S. at 62, 101 S.Ct. at 1563. This language suggests that the Court would apply to the unfair-representation claim the same ninety-

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[1] Justice Stevens' footnote 3 reads as follows:

> By its very nature, the employee's claim that the union breached its duty of fair representation cannot be resolved in an arbitration proceeding because it arises out of the conduct of that proceeding itself.

451 U.S. at 73, 101 S.Ct. at 1569.

day limitations period as it applied to the claim against the employer.

Other statements in the *Mitchell* opinion indicate, however, that a different statute of limitations applies to the claim against the union. The Court's observation that the unfair-representation claim is "more a creature of 'labor law' as it has developed since the enactment of § 301 than it is of general contract law," coupled with references to *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707, 86 S.Ct. 1107, 1114, 16 L.Ed.2d 192 (1966), and to 29 U.S.C. § 160(b) (1976) (six-month period under NLRA), 451 U.S. at 62, 101 S.Ct. at 1563, suggest that the federal labor law statute should apply, as Justice Stewart's *Mitchell* concurrence indicated, *id.* at 63, 101 S.Ct. at 1564. At the same time, the Court observed that efforts to characterize *Hines* actions as actions for breach of contract, actions upon a statute, personal injury actions, or malpractice actions "all suffer from the same flaw . . . : they overlook the fact that an arbitration award stands between the employee and any relief which may be awarded *against the company*," *id.* at 62 n.4, 101 S.Ct. at 1564 (emphasis added).[2] This language may be taken to imply agreement with Justice Stevens' view that claims *against the union*, which are not the subject of the prior arbitration, cannot be characterized as actions to vacate an arbitration award. On the other hand, this language may be interpreted as a refutation of Justice Stevens' view.

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[2] Footnote 4 of the *Mitchell* opinion reads as follows:

> Respondent suggests *Hines* actions might also be characterized as actions upon a statute, personal injury actions, or malpractice actions, all governed by a 3-year limitations period in New York. N.Y.Civ.Prac.Law §§ 214(2), 214(5), 214(6). All of these characterizations suffer from the same flaw as the effort to characterize the action as one for breach of contract: they overlook the fact that an arbitration award stands between the employee and any relief which may be awarded against the company.

451 U.S. at 62, 101 S.Ct. at 1564.

The question then becomes whether we are bound to follow the somewhat equivocal dicta expressed by a majority of the Court with reference to a matter which was not specifically before it, or whether we can follow what we think is the more persuasive reasoning expressed in a solitary dissenting opinion. We have struggled with this difficult question. Though we are pressed by the dicta of the majority, we are persuaded by Justice Stevens' analysis. Accordingly, we hold that the arbitration award statute of limitations does not apply.

The question remains whether to apply the three-year statute of limitations for malpractice actions, N.Y.Civ. Prac.Law § 214(6), or the six-month limitations period of section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1976). We are persuaded by Justice Stevens' view[3] that section 10(b) is inapplicable both

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[3] Justice Stevens' footnote 7 reads as follows:

> Under the rationale of *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704-705, 86 S.Ct. 1107, 1112-1113, 16 L.Ed.2d 192, arguably the proper statute of limitations to apply to such a claim would be N.Y.Civ.Prac. Law § 214(6) (McKinney 1976), which governs claims for nonmedical malpractice. Because the question of the appropriate statute of limitations to apply to respondent's claim against his union is not properly presented in this case, I express no definite opinion on the point. I note, however, that the Court dismisses the suggestion that this action may be characterized as a malpractice action with the observation that this characterization "overlook[s] the fact that an arbitration award stands between the employee and any relief which may be awarded *against the company.*" *Ante*, at 1564, n.4 (emphasis supplied). Because no arbitration award stands between the employee and any relief which may be awarded against the union, this observation is inapplicable to the claim against the union.

451 U.S. at 75, 101 S.Ct. at 1570.

His footnote 9 reads as follows:

> The National Labor Relations Act was enacted in 1935. 49 Stat. 449. Although § 10(b) was a part of the Act at that time, in its original form it did not contain a period of limitations. 49 Stat. 453-454. The 6-month limitations period upon which

because it relates only to administrative procedures established by Congress to resolve unfair labor practices (*see* Justice Stewart's concurrence[4]) and because it was adopted by Congress six years before the duty of fair representation was recognized. Indeed, not until *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), did the Court clearly hold the duty judicially enforceable. On the other hand, an action for breach of the union's duty fairly to represent its members at arbitration proceedings is closely analogous to an action for attorney malpractice. *See Mitchell*, 451 U.S. at 61, 101 S.Ct. at 1563 ("Our present task is to determine which limitations period is the 'most appropriate one provided by state law' "). We conclude, therefore, that the three-year

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Justice Stewart relies was added to § 10(b) in 1947. 61 Stat. 146. Six years later, the Court decided the first in a series of cases recognizing that the National Labor Relations Act imposes a duty of fair representation upon unions. *See Ford Motor Co. v. Huffman*, 345 U.S. 330 [73 S.Ct. 681, 97 L.Ed. 1048]. In 1967, in *Vaca v. Sipes*, 386 U.S. 171, [87 S.Ct. 903, 17 L.Ed.2d 842] the Court clearly held that this duty may be judicially enforced. See generally *Hines v. Anchor Motor Freight, Inc.* 424 U.S. 554, 563-567 [96 S.Ct. 1048, 1055-1057, 47 L.Ed.2d 231].

451 U.S. at 76, 101 S.Ct. at 1571.

[4] Justice Stewart's footnote 4 reads as follows:

Concededly, the terms of § 10(b) are directed to the administrative procedures provided by Congress to resolve unfair labor practices. But the fact that Congress did not provide a limitations period for a judicially enforceable action later found implied in the NLRA is not comparable to a congressional failure to establish a time limitation for an action it expressly creates by statute. *Cf. Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 [97 S.Ct. 2447, 2454, 53 L.Ed.2d 502]. In any case, it cannot reasonably be assumed here that congressional silence reflects an intent to apply state statutes of limitation for an action based in part on rights and obligations traceable to the NLRA.

451 U.S. at 68, 101 S.Ct. at 1567.

nonmedical malpractice statute of limitations applies to the employees' action against the union for breach of its duty of fair representation. This would make the action against the union timely commenced.

Judgment dismissing the complaint against Bethlehem Steel Corporation affirmed; judgment dismissing the complaint against Local 2602 of the United Steel Workers of America and the United Steel Workers of America, International reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of February one thousand nine hundred and eighty-two.

Present: HON. J. EDWARD LUMBARD
HON. JAMES L. OAKES
Circuit Judges,

#80-7020

DONALD C. FLOWERS and KING E. JONES,
Plaintiffs-Appellants,

v.

LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA, UNITED STEEL WORKERS OF AMERICA INTERNATIONAL, BETHLEHEM STEEL CORPORATION,
Defendants-Appellees

Appeal from the United States District Court for the Western District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part and reversed in part in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

APPENDIX C

UNITED STATES SUPREME COURT

No. 80-26

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL.

v.

FLOWERS ET AL.

C. A. 2d Cir.

May 4, 1981

Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United Parcel Service, Inc. v. Mitchell, ante*, p. 56. Reported below: 622 F. 2d 573.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of March one thousand nine hundred and eighty.

Present: HON. J. EDWARD LUMBARD
HON. WILLIAM H. MULLIGAN
HON. JAMES L. OAKES

Circuit Judges,

80-7020

DONALD C. FLOWERS and KING E. JONES,
Plaintiffs-Appellants,

against

LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA, and UNITED STEEL WORKERS OF AMERICA, INTERNATIONAL, and BETHLEHEM STEEL CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was taken on submission.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed based on this court's decision in *Mitchell v. United Parcel Service, Inc.*,

slip op. 1525 (2d Cir. Mar. 3, 1980), and the case is remanded to the district court.

/s/ J. Edward Lumbard

/s/ William H. Mulligan

/s/ James L. Oakes

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-79-40

DONALD C. FLOWERS and KING E. JONES,
Plaintiffs,

v.

LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA,

and

UNITED STEEL WORKERS OF AMERICA, INTERNATIONAL,

and

BETHLEHEM STEEL CORPORATION,
Defendants.

MEMORANDUM AND ORDER

This is an unfair-representation action under section 301 (29 U.S.C. § 185) of the Labor Management Relations Act ("the LMRA"). Plaintiffs, craft welders who were laid off by Bethlehem Steel Corporation ("Bethlehem") from November 1975 until April 1976, allege that they were laid off in violation of the collective bargaining agreement between Bethlehem and The United Steel Workers of America, International ("USW"), and that Local 2602 of the United Steel Workers of America ("Local 2602"), which presented plaintiffs' grievances first to Bethlehem and then to an arbitrator (who held in favor of Bethlehem), presented their grievances so negligently as to amount to an arbitrary and capricious failure to present their arguments. The arbitrator handed down his decision adverse to plaintiffs February 24, 1978; the instant suit was filed January 19, 1979.

Now before me is defendants' motion to dismiss this action on grounds that the statute of limitations has run.

The LMRA contains no statute of limitations. The United States Supreme Court has held that, in the absence of such a statute, federal courts are to apply, as a matter of federal law, the "appropriate state statute of limitations." *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 705 (1966).

The Court has provided no specific guidance as to the statute of limitations appropriate to unfair-representation suits. However, this question has been analyzed in a number of district court opinions. Where a grievance has proceeded to arbitration and state law (such as N.Y. CPLR § 7511) provides for a particularly short period of time in which to challenge an arbitrator's decision, these courts have uniformly held that the special statute of limitations was applicable. *See, e.g., Wallace v. American Tel. & Tel. Co., Inc.*, 460 F.Supp. 755, 758 (E.D.N.Y. 1978), and cases therein cited; *Barbarino v. Anchor Motor Freight, Inc.*, 421 F.Supp. 1003 (W.D.N.Y. 1976).

None of the cases cited by plaintiffs provides substantial support to their position to the contrary. The controversy in *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), *rev'g in part* Hines *v.* Local Union No. 377, Chauffeurs, Team., W. & H., 506 F.2d 1153 (6th Cir. 1974), arose not in New York, but in Ohio and Michigan, and the record is devoid of any suggestion that any statute of limitations was ever in issue. In *Abrams v. Carrier Corporation*, 434 F.2d 1234 (2nd Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971), the United States Court of Appeals for the Second Circuit did conclude that New York's six-year statute of limitations for actions "upon a contractual obligation" (*Id.*, at 1253, *quoting* New York's Civil Practice Law and Rules ("CPLR") § 213(2)) was appropriate to the unfair-representation suit then at issue. However, there had been no arbitration of that dispute and the court was careful to note that its holding was not automatically applicable to all suits brought under the "fair representa-

tion rubric," and that all the circumstances of any particular action would have to be examined to determine what period would be appropriate. *Id.*, at 1252 n.15. This court and a number of other federal district courts have concluded that the appropriate statute is CPLR § 7511 or its analogue. Not only is it the statute most specifically and obviously applicable to fair-representation suits seeking to overturn the decision of an arbitrator, but applying it to federal labor law also serves the same policies that the statute serves in state law matters. Arbitration, precisely because it offers a quick, sure and inexpensive route to resolution of disputes, is a major component—perhaps the most important single component—of federal labor law. *See, Steel Workers v. Warrier & Gulf Co.*, 363 U.S. 574 (1960). The admittedly brief 90-day statute of limitations provided in CPLR § 7511 serves to promote the use of arbitration in New York by decreasing the possibility that an arbitral award may be challenged. Adoption of this statute to suits under section 301 of the LMRA serves precisely the same important purpose. In *Auto Workers v. Hoosier Corp., supra*, the United States Supreme Court applied similar reasoning in deciding to apply a six-year statute of limitations instead of an also arguably applicable 20-year statute, noting that only a six-month statute of limitations applied to challenges of unfair-labor practice determinations (29 U.S.C. § 160(b)) and that rapid resolution of industrial suits was a goal of federal labor law. 383 U.S. at 707.[1]

Plaintiffs make two additional arguments in support of their position that they are not barred by CPLR § 7511. First, they claim that they are not seeking to

[1] Plaintiffs herein make no claim of fraud on the part of the Union or collusive behavior between the defendant unions and Bethlehem that they did not discover and could not reasonably have discovered within 90 days after the arbitrator's decision. If they had so alleged, substantially different policy considerations might have come into play.

vacate an award of an arbitrator. It is true that they make no such demand on the face of their Complaint. But the remedies they seek before me were sought before and denied by the arbitrator. Before I may award plaintiffs their requested relief, I must vacate the contrary decision of the arbitrator.

Second, plaintiffs claim that section 7511 is not applicable, as plaintiffs would, under New York labor law, have no standing under that section to contest an arbitrator's award. This argument must fail on the fundamental grounds that federal and not state law controls suits under section 301 and that plaintiffs clearly have standing under that section. *Hines* v. *Anchor Motor Freight, supra. Auto Workers* v. *Hoosier Corp., supra,* applies only the chronological requirements of state law, in the absence of a federal legislative standard. 383 U.S. at 703-04. It applies no other state law standards. *See, Wallace v. American Tel. & Tel. Co., Inc., supra,* at 575.

For the reasons hereinabove stated, defendants' motion to dismiss must be and accordingly is hereby ORDERED granted.

Dated: Buffalo, N.Y.
Dated: November 29, 1979

/s/ John T. Elfvin
U.S.D.J.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Civil Action File No. 79-40

DONALD C. FLOWERS & KING E. JONES

vs.

LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA

&

UNITED STEEL WORKERS OF AMERICA, INTERNATIONAL

&

BETHLEHEM STEEL CORPORATION

JUDGMENT

This action came on for (hearing) before the Court, Honorable John T. Elfvin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged.

The defendants' motion to dismiss is granted.

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-893

UNITED STEELWORKERS OF AMERICA AND ITS LOCAL 2602, AFL-CIO-CLC,

Petitioners

v.

DONALD C. FLOWERS and KING E. JONES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 1, 1982.

/s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 21st day of April, 1982.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. A-893

UNITED STEELWORKERS OF AMERICA AND ITS LOCAL 2602, AFL-CIO-CLC,

Petitioners

v.

DONALD C. FLOWERS and KING E. JONES

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including July 1, 1982.

/s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 20th day of May, 1982.

APPENDIX I

STATUTORY PROVISIONS INVOLVED

The National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, provides in pertinent part as follows:

Section 7 [29 U.S.C. § 157]:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 [29 U.S.C. § 158]:

Unfair Labor Practices.

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 9 [29 U.S.C. § 159]:

Representatives and elections.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 10 [29 U.S.C. § 160]:

Prevention of Unfair labor practices.

* * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency desig-

nated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 7511(a) of the New York Civil Practice Laws and Rules, CPLR § 7511(a) (McKinney), provides as follows:

> An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

Section 214(6) of the New York Civil Practice Laws and Rules, CPLR § 214(6) provides in pertinent part as follows:

The following actions must be commenced within three years:

* * * *

> 6. an action to recover damages for malpractice; . . .

APPENDIX J

PENDING DUTY OF FAIR REPRESENTATION CASES IN WHICH A TIMELINESS ISSUE HAS BEEN RAISED BUT NOT DECIDED, AND AS TO WHICH REVERSAL OF THE COURT BELOW ON THE ISSUES PRESENTED HERE WOULD BE DISPOSITIVE

Acri v. Machinists, C-82-0340, N.D. Cal.
Adkins v. General Motors, C-3-82-011, S.D. Ohio
Anderson v. Machinists Dist. 100, 81-631, 7th Dist. Ct. of Fla.
Barina v. Maritine Union, 81-3722 CBM (JRx), C.D. Cal.
Barnett v. Ford Motor, 81-0783-CU-W-1, W.D. Mo.
Bennett v. Roadway, 82-3020-CU-S2, W.D. Mo.
Bernardini v. Bethlehem Steel, 80-82, W.D.N.Y.
Blonstein v. Sea Land Services, Inc., 82 166, D. N.J.
Bortz v. Ingersoll-Rand, 82-514, D.N.J.
Branch v. Hobbs, 4-82-151-E, N.D. Tex.
Brice v. McDonnel Douglas, 81-3985R, C.D. Cal.
Brophy v. McLean Trucking Co., M 81 2197, D. Md.
Bryan v. Machinists Local 709, C82-379A, N.D. Ga.
Butler v. Government Employees, C81-482, N.D. Ohio
Burgess v. Paperworkers, CV 181-236, S.D. Ga.
Canavan v. Carter, 81-703C(1), E.D. Mo.
Chandler v. Oberle-Jordre, 81-139, E.D. Ky.
Claudio v. Arrow Aluminum, C82-60, N.D. Ohio
Collins v. American Freight System, 81-1602-CU-W-3, W.D. Mo.
DeAngeliss v. N.Y. Telephone Co., 81 Civ. 7305, S.D.N.Y.
Delgado v. McDonnel Douglas, 81-3319 WPG, C.D. Cal.
Dones v. Machinists, 77-7384 (907), El Tribunal Superior de P.R., Sala de San Juan
Dutissac v. Machinists, 81-4251, 9th Cir.
Ely v. Duriron Co., C-3-81-402, S.D. Ohio
Folk v. Standard Steel, 81-1456, M.D. Pa.
Folsom v. Spector Freight, 82-0321-CU-W-9, W.D. Mo.
Gillespie v. HPM Corp., C-2-80-979, S.D. Ohio

Gustafson v. Cornelius Co., 82-1199, 8th Cir.
Hart v. Kroger Co., 81-1547-C(A), E.D. Mo.
Harvey v. Boise Cascade Corp., C 80 128, E.D. Wash.
Hole v. Machinists, C-81-1004A, N.D. Ohio
Kepler v. Koppers Co., 82-1181, D. Md.
Kulman v. Norway Gravure, M82-67CA, W.D. Mich.
Lambert v. General Foods Corp., IP 811355C, S.D. Ind.
Lambert v. Union Boiler, C-2-80-280, S.D. Ohio
Lasch v. Seafarers, M81-185, W.D. Mich.
Leary v. Western Union Telegraph Co. & CWA, 81 Civ. 0946, S.D.N.Y.
Main v. General Motors Corp., 81-2051, D.Kansas
Manowski v. Seafarers, K81-2499, D. Md.
Mattera v. Teamsters 449, 81-97E, W.D.N.Y.
Maye v. Nitec Paper Corp., 82-181, W.D.N.Y.
Mitchell v. Teamsters Local 449, 82-118C, W.D.N.Y.
Montrose v. Office and Professional Employees Local 320, 79-1017-CU-W-4, W.D. Mo.
Opal Lee Conn v. National Can Corp., Docket # 162135, Sup. Ct. of Cal., Stanislaus
Pawlowski v. Dresser Clark, 81-1078, W.D.N.Y.
Perez v. Maline Corp., 82-0025, E.D. Ill.
Raub, v. Seafarers, 82-1432, E.D. Pa.
Rios v. Autoworkers Local 148, CV-81-5905, MML, C.D. Cal.
Saba v. Pic-N-Pay Supermarkets, C81-423, N.D. Ohio
Sabey v. Steelworkers, 81-80, W.D.N.Y.
Snipes v. Douglas Aircraft, 82-1918 MRP, C.D. Cal.
Stone v. Ryder Trucklines, 8-82-0017, S.D. Tex.
Surgest v. Shenango, 81-112, W.D. Pa.
Vasquez v. Amalgamated Industrial Union, N-80-159, D. Conn.
Vourloumis v. Seafarers, 81-1720, E.D. Pa.
Vourloumis v. Seafarers, 81-4697, E.D. Pa.
Walling v. Machinists, 81-2121, 7th Dist. Ct. of Fla.
Ward v. Alside, Inc., C79-1262A, N.D. Ohio
Weed v. East Texas Motor, CA3-79-0881-G, N.D. Tex.
Zigman v. NuCar Carrier, New York Supreme Court

APPENDIX K

[Unpublished]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-2086

PHILIP DELCOSTELLO,
Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendant,

and

LOCAL 577, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and ANCHOR MOTOR FREIGHT, INC.,
Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Shirley B. Jones, District Judge

Argued March 30, 1982 Decided April 19, 1982

Before WINTER, Chief Judge, BRYAN, Senior Circuit Judge, and HALL, Circuit Judge.

William H. Zinman; Richard P. Neuworth for Appellant; Bernard S. Goldfarb (Karen N. Moellenberg, Goldfarb & Reznick on brief) for Appellee Anchor Motor Freight, Inc.; Carl S. Yaller (Bernard W. Rubenstein, Edelman and Rubenstein, P.A. on brief) for Appellee Freight Drivers and Helpers, Local 557; (Gerard P. Martin, Melnicove, Kaufman and Weiner, P.A. on brief) for Appellees.

PER CURIAM:

After plaintiff unsuccessfully submitted his claim for wrongful discharge to binding arbitration under a collective bargaining agreement, he sued his former employer, alleging wrongful discharge in breach of contract, and his union, alleging breach of the duty of fair representation. The arbitrators' award in favor of the employer was made on July 18, 1977, and plaintiff received a copy several days later. Suit was not instituted until March 16, 1978.

Relying upon United Parcel Service v. Mitchell, 451 U.S. 56 (1981), the district court dismissed the suit and ruled that it was barred as to both the employer and the union by the thirty-day limitations period contained in Md. Code Ann., Cts. and Jud. Proc. § 3-224 (Repl. Vol. 1980).

We think that the district court was correct in its conclusion, and we affirm on the basis of its memorandum and order. *See* Delcostello v. International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, Civil Action No. J-78-436 (D. Md., Oct. 22, 1981).

AFFIRMED.